

STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter, on the Commission's own	)	
motion, to facilitate the implementation of	)	
the Federal Communication's Triennial	)	
Review determinations in Michigan	)	Case No. U-13796
	)	
	)	

**COMMENTS OF Z-TEL COMMUNICATIONS, INC.**

Z-Tel Communications, Inc. ("Z-Tel") provides the following comments on the Commission's specific questions on how the Commission may implement the Federal Communications (FCC) Triennial Review decision. Z-Tel appreciates the MPSC's Order and Notice providing them this opportunity to submit comments regarding these critical issues which will determine the future of telecommunication competition in Michigan. The MPSC's and the parties' ability, however, to prepare for the post-Triennial Review proceedings obviously is impaired by the absence of a final FCC *Triennial Review Order*. Therefore, these comments are only preliminary and the CLECs reserve the right to supplement this filing after reviewing the text of the *Triennial Review Order*. Furthermore, any procedural or other determinations made by the Commission should likewise be subject to prompt revision and modification based on the actual text of the *Triennial Review Order*.

Because the FCC's final order will not become effective until after publication in the Federal Register, there will be a slight time lag between the release of the FCC's order and the beginning of the time period for the Commission's investigation of the issues. Z-Tel encourages the Commission to start the investigation (and allow the exchange of discovery requests) as soon after the release of the order as possible. By beginning the investigation as soon as the release is

issued, but before Federal Register publication, the Commission will allow the parties several additional days to make a record for the Commission's consideration.

**1. The FCC has made a nation-wide presumptive finding that local circuit switching need not be made available as a UNE by ILECs to competitive local exchange carriers (CLECs) that provide service to business customers with high-capacity loops (described as the "enterprise market"). The basis for the FCC's presumptive finding is that competition in enterprise markets would not be impaired if the local switching UNE were unavailable. However, the FCC further indicated that each state would have 90 days from the effective date of the Triennial Review order to rebut the presumption of "no impairment" as it affects that state. The Commission seeks general comments on a procedural mechanism that can be completed within the 90-day period. Comments should address the following related issues:**

**(a) Should the Commission make its impairment determinations in a single, generic proceeding that affects all ILECs, CLECs, and regions of the state? Or should it make individualized determinations for different carriers (or classifications of carriers) in different regions? If so, what would be the relevant geographic region? If some proceeding other than a generic case is envisioned, please describe. Should the determinations be made on the basis of a record created through evidentiary hearings or on written comments?**

Until the FCC issues its decision identifying the substantive aspects of the federal policy, it is difficult to comment on the best procedural way to implement those policies. It may very well be that CLEC-specific adjudications are needed to satisfy the legal requirements fully. In a way, how the Commission frames the question can help determine whether generic or CLEC-specific cases are appropriate. Z-Tel submits that focusing upon whether actual, vibrant and robust wholesale alternative suppliers of switching capacity are present in Michigan is the proper – and most-efficient – means of addressing these proceedings.

If the Commission limits its impairment analysis to whether a CLEC can "self-supply" switching capacity (thereby ignoring whether a wholesale market exists), the Commission may have no choice but to address impairment in a series of CLEC-specific adjudications. CLECs have different capabilities; a network deployment that one CLEC (say, one focused exclusively on Fortune 50 companies) might be able to undertake may be a network architecture another

CLEC (say, one focused upon small businesses like flower shops and bookstores) might not be able to undertake.

If, however, the Commission properly focuses upon whether actual, wholesale alternatives to ILEC-provided switching capacity exist in Michigan, more flexibility is available and the Commission may begin to make “market-wide” determinations in a geographic area that could apply to all CLECs that seek to provide service in that geographic area, even those that may not participate in the proceeding.

Setting those issues aside, Z-Tel believes that notwithstanding the compressed timeframe of these 90-day cases, it is important to provide all sides of the issue (competitor, incumbents, and the public) opportunities to make their “initial” cases and “rebuttal” cases through sworn testimony, and to give parties a full and complete opportunity to cross examine witnesses. Z-Tel believes that the Commission should plan on the simultaneous filing of a round of initial and rebuttal testimony, and even consider the possibility of admitting sur-rebuttal testimony in the event new arguments and evidence is presented in the rebuttal round. At the conclusion of the submission of testimony, a hearing should be held to examine the witnesses to test the credibility and veracity of the statements made to support each parties’ positions. Because of the compressed timeframe, discovery should be permitted up through the dates of the hearings.

Critically important is how the Commission will manage the discovery process. The Commission needs to provide parties with the opportunity to engage in meaningful discovery in the proceeding. A reason the FCC has delegated these federal issues to the Commission is because the FCC has concluded that state commissions are in a better position to adjudicate the facts to support the decision to make switching available to CLECs serving customers in the enterprise markets. These issues are complicated and fact-based, so full and complete discovery

is also important to preserve parties' due process rights. Those due process rights cannot be discounted, given that the issue in this case involves the ability of competitors to offer service, compete, and possibly even exist in Michigan.

In the 90-day cases, parties should not be required to present a "complete" case prior to commencement of discovery. Assuming the FCC concludes that competitors have the burden to *prove the facts* that "enterprise" switching is required to be made available by Incumbent LECs, the Commission must still establish a process that requires the Incumbent LECs to *produce the facts* necessary for the Commission to reach its decision. There is a distinction between the concepts of "burden of persuasion" and "burden of production." The Commission cannot make a reasoned decision if the Commission's process allows the LECs to withhold facts through discovery from the Competitors and then places the burden of persuasion on the Competitors. The Commission can, and should, make it clear that the burden of production of facts is placed upon incumbent LECs, even assuming that the FCC's orders impose the ultimate burden of persuasion on competitors.

Given the 90-day period, the Commission needs to impose significant and severe sanctions on LECs that withhold responses to discovery requests, or interpose objections merely to delay the production of facts necessary for CLECs to put on their case that switching should be made available to CLECs. It is well established that where there is a failure to produce evidence in one's control a presumption arises that if the evidence were produced it would operate against the party who failed to produce it. *Johnson v. Austin*, 406 Mich. 420, 440, 280 N.W.2d 9, 14 (Mich., Jun 25, 1979). The Commission must enforce this rule in the context of this proceeding.

A key component in assigning the burden of production is whether a party has information within its exclusive possession of information. In a 90-day case (as well as 9-month case), there are several factual matters that may become critical components of a CLEC's impairment case that the incumbent LEC may have exclusive control over, and which a CLEC would need to know the answers prior to making an impairment showing. For example, evidence important to resolving questions of operational impairment, such as the ILEC's actual performance in providing DS1 links or EELs in Michigan, and the ILEC's collocation practices, are within the exclusive control of the incumbent LEC. In addition, questions relating to economic impairment – in particular, the price SBC, a BOC, would propose to charge a CLEC for DS1 and above switching in the absence of an unbundling/TELRIC requirement – are also in the control of the ILEC. Without the ability to obtain discovery on these and other points, a CLEC would be hampered in putting forward a complete and comprehensive case of impairment. As a result, full and open discovery should proceed prior to filing of testimony.

In response to the specific questions raised by the Commission whether the Commission should make its impairment determinations in a single, generic proceeding that affects all incumbent LECs, CLECs, and regions of the state, or whether it should make individualized determinations for different carriers (or classifications of carriers) in different regions, Z-Tel states that it is difficult to comment on this until the FCC issues the details of its conclusions. Generically, without knowledge of what the FCC's Order provides, Z-Tel believes that the MPSC should analyze whether an actual, vibrant, and robust wholesale market for "enterprise" switching (for lack of a better term) exists in the particular geographic area under study. The key factor in analyzing a CLEC is "impaired" without access to ILEC-supplied unbundled switching capacity is whether replacement, wholesale capacity is actually available (economically,

operationally and practically) from alternative, non-ILEC sources. This wholesale availability analysis may analyze whether there are other carriers that actually provide switching on a wholesale basis within the ILEC-central office exchange, and the economic conditions by which CLECs can serve customers (i.e. the wholesale cost, if any, available from competitors, and the competitive market price of the services being sold to customers.) Other facts that will be relevant to determine impairment for “enterprise” switching are costs of transport, cost and availability of EELs, cost and availability of collocation, etc. Another a key issue is under what conditions alternative wholesale switching is provided, and whether the alternative switching can be integrated into and compatible with a competitive provider’s services.

The MPSC may find it useful to establish guidelines for analyzing the robustness of this wholesale market, but such guidelines could only be implemented *after* a full and complete record of evidence is developed through a hearing. For a number of reasons, in order to make a determination that *every* potential competitive entrant would not be impaired without access to unbundled “enterprise” switching, the MPSC needs to be assured that actual, real-world – not hypothetical – alternatives exist. Such a determination cannot be made merely on an exchange of comments. Hearings need to be held.

**(b) What other issues should be addressed as part of the 90-day proceeding?**

The relationship and nature of SBC’s section 271 obligations to provide to competitors (without qualification) unbundled switching and state law obligations will clearly play a role in both 90-day and 9-month proceedings. The 90-day and 9-months cases are directed at a common question – are competitors “impaired” in providing the service they seek to provide without access to unbundled switching under section 251(c)? Z-Tel does not see how that question can be answered without analyzing the extent to which section 271 and/or state law require any

alternative form of access to unbundled switching. It is the difference between section 251(c) unbundled access and these other forms of mandated access that would define section 251 “impairment.”

SBC certainly intends to pursue interLATA authority in Michigan, and checklist item (vi) clearly requires them to provide competitors “unbundled” access to switching, without qualification or limitation. This Commission has clearly recognized the link between the availability of unbundled switching under the section 271 checklist by caveating its decision to support SBC’s 271 application in Michigan on these grounds, stating:

We do issue one caveat, the Michigan competitive market is significantly dependent on the availability of the Unbundled Network Element Platform (UNE-P). We believe that elimination or severe curtailment of UNE-P would adversely impact our competitive market. Our recommendation [to support SBC’s 271 application] is **predicated** on the FCC’s continuation of policies and rules that allow competitors to access UNE-P for the foreseeable future and throughout an orderly transition to facilities-based competition. In fact, we support UNE-P as consistent with the methods of competition specified in the 1996 Federal Act, including resale, facilities-based and unbundled network elements.<sup>1</sup>

The terms of access that section 271 requires Bell Operating Companies that seek to provide interLATA services (such as SBC Ameritech) are directly relevant to, and indeed may obviate entirely, any “impairment” determination as it would apply to that BOC.

While much about the FCC’s *Triennial Review Order* is unclear, as the FCC thus far has issued only a press release, the FCC has made clear that a Bell Operating Company whose section 271 application has been approved must continue to provide access to the network elements listed in the section 271 checklist. The FCC also stated in its *Triennial Review* press release that the general pricing rules of sections 201 and 202 of the Communications Act, rather

than the pricing rule Congress established for network elements in section 252(d)(1), applies if a particular network element is provided pursuant to section 271 rather than section 251.<sup>2</sup> Thus, according to the FCC, BOCs with authorization to provide long-distance service must provide unbundled access to loops, transport, switching, and signaling, but are not required to provide access at TELRIC rates if those network elements are “de-listed” under section 251.<sup>3</sup>

The FCC’s *UNE Remand Order* first adopted that approach. Then, the FCC explained its decision by stating that a conclusion that a competitor is not impaired without access to an element “is predicated in large part upon the fact that competitors can acquire [the element] in the marketplace at a price set by the marketplace.”<sup>4</sup> In that circumstance, the FCC concluded, “the market price should prevail, as opposed to a regulated rate which, at best, is designed to reflect the pricing of a competitive market.”<sup>5</sup> Thus, the FCC concluded that sections 201 and 202 call for the application of the “market price” as the “just and reasonable rate” for a network element that must be provided by a BOC under section 271 but is not required to be unbundled by all incumbents under section 251.

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<sup>1</sup> Letter from Chairman Laura Chappelle, Commissioner David A. Svanda and Commissioner Robert B. Nelson, Michigan Public Service Commission, to the Commissioners of the Federal Communications Commission 2 (Jan. 13, 2003).

<sup>2</sup> The attachment to the FCC’s *Triennial Review* press release states, in full, with respect to section 271 issues: “The requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling, under checklist items 4-6 and 10, regardless of any unbundling analysis under section 251. Where a checklist item is no longer subject to section 251 unbundling, section 252(d)(1) does not operate as the pricing standard. Rather, the pricing of such items is governed by the ‘just and reasonable’ standard established under sections 201 and 202 of the Act.” FCC, News Release, CC Dockets Nos. 01-338, 96-98, and 98-147 (Feb. 20, 2003), Attachment at 4.

<sup>3</sup> As discussed below, Z-Tel strongly disagrees with the FCC’s apparent legal conclusion that TELRIC rates do not apply to unbundling mandated by section 271.

<sup>4</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (UNE Remand Order)*, 15 FCC Rcd 3696 (1999) ¶ 473.

<sup>5</sup> *Id.*

Z-Tel contended before the FCC in the *Triennial Review* proceeding that Congress plainly intended BOCs to provide access to the network elements listed on the checklist *and* that Congress intended those elements to be priced under the rule it established for network element pricing in section 252(d)(1). Thus, Z-Tel believes that the FCC was correct in concluding that BOCs must provide unbundled access to loops, transport, switching, and signaling regardless of the result of the impairment inquiry, but that the FCC was wrong in concluding that the pricing rules of sections 201 and 202 apply in that situation. In addition, we pointed out to the FCC that sections 201 and 202 by their terms apply only to interstate and foreign communications, so that, if the FCC exercises pricing authority under those provisions, its authority extends only to the interstate portion of the element in question. From the FCC's press release, it is clear that the FCC intends to apply sections 201 and 202, but it is not clear how the FCC will deal with the jurisdictional limitations in those provisions. The proper course – if one assumes that use of sections 201/202 rather than section 252(d)(1) were proper – would be that the FCC's "market rate" rule applied to the interstate portion of the network elements in question, while state commissions would have broad authority to determine the rate for the intrastate portion of the element, as is the rule for depreciation under *Louisiana Public Service Commission v. FCC*.<sup>6</sup>

Establishing the rate for section 271 switching in this manner would be entirely consistent with the Supreme Court's ruling in *AT&T Corp. v. Iowa Utilities Board*.<sup>7</sup> In that case, the Court ruled that the FCC's rulemaking authority extends to all provisions of the Communications Act and that many of the provisions added in 1996 – including section 252(d)(1) – apply without respect to traditional jurisdictional boundaries. (Although it is

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<sup>6</sup> *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986).

<sup>7</sup> *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999).

important to keep in mind that the pricing provisions added in 1996 divide authority in a different manner – the FCC has rulemaking authority but the state commissions actually establish rates.) However, sections 201 and 202 (the pricing standards the FCC press release states are the source of its “market based” pricing idea) were not part of the 1996 Act and remain subject to the 1934 Act’s traditional jurisdictional boundaries. Sections 201/202 of the Communications Act are like section 220, the depreciation provision at issue in *Louisiana Public Service Commission*, and establish FCC ratemaking authority for interstate and foreign services. There is no plausible reading of those provisions under which that jurisdictional limitation may be ignored. The contrary conclusion – that the 1996 Act abolished consideration of jurisdictional limitations altogether – would mean that the FCC could regulate all end-user rates for all intrastate services, since sections 201 and 202 provide that *all* rates charged by telecommunications carriers must be “just and reasonable.”

Nevertheless, assuming the *Triennial Review Order* lawfully directs state commissions to apply the “just and reasonable” standard of sections 201/202 and that a “market rate” approach is the appropriate implementation of that standard, without regard to the jurisdictional limitations in sections 201 and 202, there is no good reason to think that true “market rates” would differ significantly from TELRIC rates. The FCC’s TELRIC methodology is designed, as the FCC stated when adopting it, to “simulate[] the conditions in a competitive marketplace.”<sup>8</sup> Therefore, where TELRIC is applied properly, the price for a network element under section 252(d)(1) should be similar to the market price for the network element. Of course, the TELRIC rates that have been established by the Commission and incorporated into interconnection agreements

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<sup>8</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 ¶ 679 (1996).

approved by state commissions are the product of considerable study and guarantee the ILEC a “reasonable profit.” Moreover, this TELRIC methodology was upheld by the Supreme Court<sup>9</sup> and the incumbents have had the opportunity to challenge the network element rates established by this Commission in court. For these reasons, the prices this Commission has established for network elements would differ significantly from the “market rates” for those same elements *only if a competitive market for that element did not actually exist.*

Accordingly, if an ILEC contends that it should be permitted to charge a “market rate” that is significantly higher than the TELRIC rate the Commission has established for a network element, that contention would call into question any claim that competitors are not impaired without access to the network element. The fact that the ILEC would like to charge more than the TELRIC rate for a network element would support the conclusion that there is no competitive market for the network element in question – and competitors plainly are impaired if there is no competitive method under which they could purchase an element or self-provision it at a cost comparable to that incurred by an incumbent.

The alternative conclusion that LEC may advance – that the TELRIC rate is too low – could only be supported if a LEC presents evidence showing that there is a competitive wholesale market and the rate for the network element in that wholesale market is higher than the TELRIC rate. But that “market rate” must be the product of a truly competitive market rather than a highly concentrated market.

Finally, even if the rate a LEC intends to charge for switching is higher than the TELRIC rate and the Commission nevertheless decides to proceed with the switching impairment analysis, the Commission must first – before finding non-impairment – determine what rate the LEC proposes to charge for switching and whether that rate is itself just and reasonable.

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<sup>9</sup> *Verizon Communications Inc. v. FCC* 122 S. Ct. 1646 (2002).

Congress made clear that BOCs must provide access to network elements on the section 271 checklist – including switching, which is required to be unbundled by checklist item (vi) -- by means of interconnection agreements. Indeed, legislative history explains that Congress intended “the competitive checklist to set forth what must, at a minimum, be provided by a Bell operating company in any interconnection agreement to which that company is a party.”<sup>10</sup> Section 252, of course, directs this Commission to resolve disputes over the terms of interconnection agreements, and specifically directs state commissions to “establish any rates ... for network elements.”<sup>11</sup> Because disputes are sure to arise with respect to whether the rates a LEC seeks to charge accurately reflect the market rate, this Commission likely will need to determine what the market rate is. The rate is *not* whatever the LEC (i.e. SBC) says it intends to charge. Z-Tel submits that a “just and reasonable” market rate is a rate within the range offered by competitors in a competitive wholesale market (not a monopoly market or a highly concentrated market), and we believe that analysis of wholesale alternatives should play a critical in these 90-day and 9-month cases.

**(c) To what extent should the Commission’s 90-day proceeding be coordinated or combined with similar investigations in other states in SBC’s region?**

Z-Tel believes that state commissions should actively seek to coordinate procedural and hearing schedules in the 90-day and 9-month cases. Z-Tel offers service in the SBC region and 47 states nationwide, yet Z-Tel has a small regulatory staff on hand to conduct these proceedings. In addition, witnesses, both in-house and outside experts, are in limited supply. Every state in the SBC region should have the benefit of full, complete and comprehensive cases presented by both sides. Coordination of filing dates and hearing schedules so as to minimize

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<sup>10</sup> S. Rep. No. 104-23, 104th Cong., 1st Sess. 43 (1995).

<sup>11</sup> 47 U.S.C. § 252(c)(2).

“overlap” and conflicts in filing and hearing schedules would be critical to ensuring that all SBC region commissions as complete a record and the best advocacy as possible.

Z-Tel also believes that the SBC-region state commissions should immediately commence informative, informal sessions or workshops in which all sides of the case – competitor, incumbent, consumers, and small businesses – would participate and provide their initial arguments, viewpoints and positions. These sessions should be held outside of the standard “hearing” process and certainly should not substitute for discovery, hearings and cross-examination. Such sessions could be conducted immediately, even before release of the FCC order, and would educate state commissioners and staff on critical issues that will be debated subsequently in the formal hearing process. The workshops may assist in allowing the parties to narrow these issues, but would certainly not be a substitute for complete, state-specific factual analyses.

Z-Tel believes that hearings and determinations should not be held jointly among states. These cases require highly fact-specific reviews that will involve, for example, an examination of the status of competition, wholesale alternatives to ILEC switching in Traverse City, Michigan. Indeed, one of the reasons that the FCC has delegated these issues to the individual states is to allow state commissions the opportunity to undertake an investigation of the granular market conditions in Michigan. Undertaking that fact-specific and geographic-specific review at the 14-state level would not be possible or practicable. Replacing a consolidated 50-state review with a consolidated 5-state review would not, in Z-Tel’s opinion, provide the opportunity for sufficient granularity. However, as discussed in Z-Tel’s Response to Question No. 1(a) below, Z-Tel believes that the Commission should consider ways in which protective agreements can be coordinated with other state commission proceedings, so that facts and information discovered in

one state “impairment” proceeding may be utilized in other state proceedings. While the final determination must be Michigan-specific, the Commission should strive to make sure that parties can introduce and utilize all information relevant to that determination, including information discovered in other state proceedings.

**(d) What other regulatory changes would become necessary if the Commission were to decide to retain the tariff requirement to make local switching available as a UNE for the enterprise market?**

As Z-Tel discussed in its response to Question 1(b) above, costing, pricing and 271 reviews are clearly impacted by these proceedings. To the extent that interconnection agreements would need to be modified as a result of a decision, the section 252 negotiation and arbitration process would presumably begin immediately after the Commission’s decision became effective.

**(e) Provide any other comments regarding issues that should be considered by the Commission in implementing the FCC’s Triennial Review determinations.**

State commission determinations regarding switching must be comprehensive and based on evidence adduced through an adjudication process. These conclusions cannot be based on mere policy argument. The issues are too important to the future of competition in the telecommunications market for the Commission to simply adopt policy based on policy positions asserted by the parties. The Commission should not base its conclusions on conjecture, speculation, wishful thinking, or incomplete records, discovery, and data. As the Commission embarks on this task, it should consider the real-world consequences its decisions will have. In Michigan, several hundred thousand lines are today provided to consumers and small businesses through unbundled local switching. The availability of the unbundled network element platform (“UNE-P”) has introduced new services to consumers in Michigan and, indeed, nationwide. For example, because of UNE-P, Z-Tel and other competitive providers now offer Michigan

residential customers unlimited local and long distance calling, and enhanced vertical features for one price. Z-Tel's Z-LineHOME service, available in 47 states including Michigan, also gives consumers access to new, innovative software like its "Personal Voice Assistant", which allows for voice recognition dialing, voice e-mail and FollowMe features. Entrants are utilizing UNE-P to offer packages and services like this to consumers in Michigan and the rest of the U.S., and a recent *USA Today* article referred to Bell company competitive efforts to respond as "copycat plans."<sup>12</sup> For Michigan, the all-distance packages (offered by UNE-P providers) free consumers of per-minute long-distance charges and offer Michigan communities the promise of economic development, substantial cost savings, and new business opportunities. Without UNE-P, Michigan customers would once again be chained to high per-minute toll rates, metered usage charges, and a denial of innovative services like Personal Voice Assistant.

Because UNE-P availability has an impact upon real competitive services, real price savings, and real innovative services now available, thousands of consumers took the time to participate in the FCC's Triennial Review decision. Groups like the AARP, United States Federation of Independent Businesses, and consumer groups participated actively. This debate is not simply an intra-industry squabble. As a result, the Commission should establish open procedures and also reach out for comment and participation from the public and consumer and small business interest groups in Michigan. On-the-record formal or informal field hearings or site visits should be considered, so that the Commission understands fully the impact UNE-P is having for consumers and small businesses statewide. Part of making the decision on UNE-P includes understanding the impact the absence of UNE-P would have upon competitive providers, their customers, and communities in which they live.

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<sup>12</sup> Michelle Kessler, "Callers Jump at Chance to Gab, Gab, Gab," *USA Today* (Apr. 22, 2003) ("New, all-you-can-call phone plans are scoring big with consumers...MCI launched the trend a year ago with its Neighborhood plan.

**2. The FCC's February 20, 2003 announcement indicates that the rule changes will discontinue the requirement to offer local switching as a UNE for purposes of serving the "mass market." However, the FCC further indicates that state commissions will have nine months to make individual findings as to whether the mass market would be impaired by such discontinuation. The Commission seeks general comments in regard to this rule change:**

Z-Tel disagrees completely with the Commission's premise that the February 20, 2003 announcement indicates that the rule changes will discontinue the requirement to offer local switching as a UNE for purposes of serving the "mass market." In fact, the FCC release indicates precisely the opposite result. The FCC press release indicates that there is a presumption that local switching for what the FCC calls the "mass market" will be made available. The Attachment to the FCC news release provides:

For mass market customers, the Commission sets out specific criteria that states shall apply to determine, on a granular basis, whether economic or operational impairment exists in a particular market. State Commissions must complete such proceedings (including the approval of an incumbent LEC batch hot cut process) within 9 months. ***Upon a state finding of no impairment, the Commission sets forth a 3 year period for carriers to transition off of UNE-P.***<sup>13</sup>

Z-Tel interprets this statement to mean that only "upon a state finding of *no impairment*" will competitors be required "to transition off of UNE-P." In other words, the default conclusion is that unbundled local switching is available to serve the "mass market". Importantly, if the Commission cannot (or does not) make a finding of "no impairment" within nine months, the default conclusion will prevail, and unbundled local switching for the "mass market" will be available.

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... BellSouth, Qwest Communications, SBC Communications and Verizon lauched copycat plans.").

<sup>13</sup> FCC, *Triennial Review* News Release, Attachment A, ¶ 1 (emphasis added).

**(a) To what extent should the Commission's nine-month proceeding be coordinated or combined with similar investigations in other states in SBC's region? If other state commissions in SBC's region develop evidentiary records in comparable proceedings, should those records be adopted by reference or otherwise incorporated into the Commission's record? If so, to what extent?**

Please see Z-Tel's Response to Question 1(c) above. However, the Commission should recognize that some of the same information and discovery relevant in one proceeding will also be relevant in the other proceeding. As a result, information and discovery produced in one proceeding should be readily available for use in the other proceeding, consistent with protective orders. Z-Tel encourages the Commission to work with other jurisdictions to establish a common protective order that would permit information gathered in one state to be utilized in another state proceeding. Z-Tel believes that the Commission needs to conduct its own investigation on the granular market conditions in Michigan. Only a Michigan-specific investigation can satisfy the needed market-specificity and granularity. Evidence obtained in other state proceedings may also be useful to impeach witnesses in a Michigan proceeding, provided that such use is consistent with any applicable protective order, but in general, joint findings of fact are not likely to be sustainable.

In the end, however, the Commission needs to make its determination based upon conditions in Michigan. In particular, there are many factual questions that need to be adjudicated on a Michigan-specific basis to determine whether the market conditions exist to overcome the presumption that switching will be made available. The determination as to whether alternative, wholesale providers of "mass market" switching capacity are highly fact- and geographic-specific, and involve a number of factors well beyond simply "counting" the number of CLEC-operated switches, especially if those switches are only utilized to provide "enterprise" services. These factual determinations are fundamental to overcome the

presumption that switching will be made available to serve what the FCC indicates are “mass market.” These granular factual questions are, in the end, state-specific.

**(b) To what extent should the Commission’s investigation be expanded to include, beyond the question of impairment, the other rule changes noted in the FCC’s February 20, 2003 announcement?**

Z-Tel believes that the 9-month inquiry required by the FCC will be of sufficient complexity and fact-specific that including other *Triennial Review* issues (such as advanced services, interoffice transport, etc.) in that proceeding would be strongly inadvisable. The Commission’s task in the 9-month case is an adjudication of a particular set of issues and factual determinations that must be completed in a limited timeframe. Those adjudicatory findings, record and process, and the Commission’s final action must stand and be defensible on their own, without regard to the resolution or disposition of other post-Triennial implementation issues.

In addition, at this time, it is not possible to determine precisely how the FCC believes the other aspects of the *Triennial Review Order* are to be implemented. To the extent ILECS and CLECs have effective interconnection agreements, specific change-in-law clauses may govern implementation of any rule changes. Those change-in-law clauses may incorporate precise timetables for implementation that would apply without regard to any 90-day or 9-month clock. Imposition of a timeframe that differed from those set forth in interconnection agreements could run afoul of the Contracts Clause and would have to comply with the *Mobile-Sierra* doctrine.<sup>14</sup>

Even if existing agreements are silent, past practice indicates that the section 251-252 interconnection agreement negotiation and arbitration process is the method in which new rulings would be implemented. That process utilized after the FCC’s *First Local Competition*

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<sup>14</sup> See *Federal Power Commission v. Sierra Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

*Order* and *UNE Remand Order* and contemplates at least 13 days of ILEC-CLEC negotiations prior to filing of a petition for arbitration before the Commission.<sup>15</sup>

**(c) What other regulatory changes would become necessary if the Commission were to make impairment findings that support retaining the tariff requirement to make local switching available as a UNE for the mass market?**

Please see Z-Tel's Response to Question 1(b). Stated simply, part of the "impairment" decision is an analysis of whatever alternatives to unbundled switching capacity exist. That analysis places the focus on section 271 obligations of Bell operating companies (like SBC), independent unbundling obligations under state law, and whether actual, vibrant wholesale alternatives exist in Michigan. Because section 271(c)(2)(B)(vi) places no limits on the type of classification of switching SBC must provide to competitors where SBC is authorized to offer interLATA services, the same section 271 arguments discussed in Z-Tel's Response to Question 1(b) apply with regard to "mass market" switching.

**(d) Should the Commission set a deadline for filing petitions for leave to intervene in advance of the initial hearing date or the issuance of any procedural schedule?**

Z-Tel suggests that the Commission establish a deadline for any party that wishes to attempt to rebut the FCC's presumption to file a notice stating its desire to rebut such presumption. This will allow the Commission to establish a reasonable procedural schedule and put other carriers on notice that the PUC will be conducting an impairment proceeding on the specific UNE(s). Z-Tel believes that all affected parties should be permitted to intervene into the case at any point in time (subject to the requirement that they take the record of the case as it stands.)

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<sup>15</sup> 47 U.S.C. 252(b)(1).

**(e) Provide any other comments regarding issues that should be considered by the Commission in implementing the FCC's Triennial Review determinations.**

Please see Z-Tel's Responses to Question Nos. 1(a), (c), and (e). Z-Tel believes that a critical focus of the Commission's analysis in this case should be upon whether actual, competitive wholesale alternatives to ILEC-provided switching exist in Michigan. New entrants, especially small companies like Z-Tel that do not have enormous capital budgets that can be directed at deploying redundant Class V switches, are clearly "impaired" in their ability to provide service absent actual wholesale alternatives to ILEC-provided switching. And, as discussed in Z-Tel's Response to Question No. 1(b), the presence of active and vibrant wholesale alternatives would ensure that any "market-based" rate for switching required under section 271 is just and reasonable. As discussed in Z-Tel's Response to Question No. 1(a), only by analyzing the availability actual (not hypothetical) wholesale alternatives can the Commission even begin to determine whether CLECs are, as a general matter, "not impaired" without unbundled access. Focusing solely upon whether CLECs can "self-provision" may oblige the Commission to engage in CLEC-specific "impairment" adjudications that could be administratively impossible to complete within the requisite nine months.

An examination of whether wholesale, non-ILEC providers of "mass market" switching capacity are **actually available** involves a number of operational factors, in addition to economic analysis. For example, does the ILEC have available operational systems that can be relied upon by CLECs to use an ILEC-provided loop and third-party switching capacity? Can CLEC systems support that network configuration? The Commission must understand what would face a CLEC moving off ULS in terms of ordering and provisioning. Even if an alternative to ILEC switching were available in theory, the CLEC may be impaired due to the lack of adequate solutions to ordering and provisioning, maintenance and repair, and billing systems. These

systems are crucial for turning the theoretical possibility of wholesale switching availability into a reality. The existence of sources of switching does not ensure that adequate systems are in place and can handle mass volumes needed to support competitive service.

In addition, whether ILEC networks could reasonably accommodate a massive shift of local traffic from end-office switches that have already been engineered to handle these calling volumes to interconnection trunks and tandems must be examined. Clearly, any network change necessitated by the ILEC's request that a UNE be removed is not "caused" by CLECs and cannot be charged to CLECs or recovered through wholesale rates.

An examination upon whether wholesale alternatives actually exist (rather than a phantom belief in self-supply) is even more relevant in light of recent SBC admissions that it has determined that it cannot afford to build networks to compete for small-business and residential customers in out-of-region markets (such as the 30 markets it promised to enter after the SBC-Ameritech merger). On May 26, 2003, the *Los Angeles Times* reported: "[Mr. Edward D.] Whitacre, SBC's chairman, said small-business and residential customers wouldn't provide enough revenue to justify the expense of building out SBC's network in the 30 markets. And the company doesn't want to lease equipment from another Baby Bell to reach them because it wants to control its own infrastructure."<sup>16</sup>

It is clear from Mr. Whitacre's statements that SBC has investigated the feasibility of this "mass market" entry in areas where it does not own local loops, switches and transport networks, and that SBC understands, for its own purposes, the economics of impairment in competing for small business and residential customers outside of its ILEC region. Has anything changed since the SBC/Ameritech merger, where SBC's out-of-region entry plans consisted of using UNE-P to

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<sup>16</sup> *Los Angeles Times*, "Phone Rivalry as Simple as McDonalds vs. Burger King, SBC Head Says," May 26, 2003, available electronically at: <http://www.latimes.com/la-fi-bigmact26may26,0,826191.story>.

serve residential and small business customers? SBC's claims about CLEC impairment in Michigan should be judged alongside its own out-of-region entry analysis and data, which appears to show that SBC believes it cannot self-supply network infrastructure in order to compete for small-business and residential customers outside its traditional ILEC regions.

Whether vibrant, wholesale alternatives for "mass market" switching capacity are present throughout Michigan is the linchpin of the "impairment" analysis. Z-Tel believes that such an environment is achievable, and indeed has occurred in the long-distance industry, where hundreds of companies now compete and provide valuable and value-added services without the need to construct redundant long-distance networks.

**3. The FCC's February 20, 2003 announcement highlights other significant rule changes. For example, the FCC has indicated that the Triennial Review order will:**

**1) clarify total element long-run incremental cost rules for purposes of UNE pricing; 2) make transitional provisions to allow for the conversion of UNEs to special access; 3) require shared transport; and 4) permit the commingling of UNEs and other wholesale services such as special access. To facilitate the orderly implementation of these significant rule changes, what procedures should the Commission institute?**

Z-Tel believes that these changes should proceed pursuant to the existing interconnection agreement terms and process. The section 251-252 interconnection negotiation and arbitration process are the principal statutory mechanisms for implementing federal unbundling rules. The section 252 arbitration process contemplates a 135-160 day negotiation period before a state commission may be called upon to arbitrate a dispute. Any party may also request the state commission to mediate a dispute.

To the extent that ILECs and CLECs have existing interconnection agreements, the change in law provisions in those agreements should govern. Existing interconnection agreements between ILECs and CLECs generally contain "change in law" provisions that may provide for negotiation and dispute resolution process for implementing changes to agreements

that may be necessary as a result of the FCC's *Triennial Review Order*. Those change-in-law and dispute resolution clauses in an interconnection agreements between a CLEC and an ILEC have been approved by the Commission; as a result, the process spelled out in the four-corners of those agreements would be binding upon those parties and might even trump the section 251-252 process for those parties, depending upon the specific language of the contract. Z-Tel suggests that the Commission allow these processes to play out before initiating any subsequent action.

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